Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO. Case 7–CA–31476

August 18, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On May 15, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union.[1] The Respondent was ordered to cease and desist and to take certain affirmative action to remedy the unfair labor practices.

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit, and the Board filed a cross-petition for enforcement of its Order. On March 1, 1993, the court granted the Respondent's petition for review and denied the Board's cross-petition for enforcement.[2] The court held that: (1) the Board must reevaluate one of the two union campaign documents at issue in the Respondent's Objection 2 in the representation proceeding in Case 7–RC–19227;[3] (2) the Respondent was entitled to a hearing on the allegation that the Union had forged authorization cards, which was the subject of the Respondent's motion to reopen the record filed on June 7, 1991.[4] The court remanded the proceeding to the Board for the limited purposes set forth in its opinion.

On November 22, 1993, the Board remanded the proceeding to the Regional Director for Region 7 for the purpose of arranging a hearing before an administrative law judge limited to the allegation concerning the false authorization cards. The Board also ordered that the administrative law judge's decision should include both the forged cards allegation and a reevaluation of the Union's May 8, 1990 letter to employees.

On March 25, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union answered the Respondent's exceptions, and the Respondent replied to the Union's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[5] and conclusions[6] and to adopt the recommended Order.

[1] 302 NLRB 982.

[2] *Dayton Hudson Department Store v. NLRB*, 987 F.2d 359 (6th Cir. 1993).

[3] In its Objection 2, the Respondent alleged that the Union's May 8, 1990 letter intentionally contained gross misrepresentations of material facts about the Respondent's profits and that its distribution was timed to preclude any effective response. The court upheld the Board's decision to overrule Objection 2 insofar as the Respondent alleged that the Union's campaign flyer distributed on the day of the election, May 11, 1990, constituted a forged document. The court also upheld the Board's decision to overrule Objections 3 and 4.

[4] In its motion to reopen the record, the Respondent alleged that the Union had forged authorization cards and had used these to claim widespread support for the Union during the campaign.

[5] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Here the judge based his findings not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In particular, we agree with the judge's finding that John Madgwick's claim that he forged authorization cards is a ''total fabrication.'' The Respondent errs in claiming that the delay of almost 4 years from the events at issue and the hearing about them impaired the judge's credibility findings. To the extent that delay may have adversely affected any testimony, it would have equally affected all witnesses, not just those of the Respondent. See *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1343 (9th Cir. 1987). Moreover, the judge did not rely on imprecision and vagueness alone in making his credibility findings. He specifically cited demeanor as well as the panoply of considerations outlined above. We refer especially to the judge's analysis of the testimony of John Madgwick, Rosemary Minni, and Suzann Roberts. We find no error in the judge's credibility findings.

[6] In its exceptions, the Respondent asserts that Region 7's mishandling of authorization cards deprived the Respondent of the ''full inquiry'' mandated by the court on remand. The Respondent refers to the fact, which was revealed at the hearing, that on November 9, 1992, the Region inadvertently returned cards to the Union from the Respondent's Westland store rather than from the Respondent's Fairlane store. (The Fairlane store was the subject of a withdrawn election petition also involving the Union.) The Union returned the Westland cards on November 23, 1992, when the Union discovered the mistake. With reference to this incident, the Respondent's counsel acknowledged on the record that there was ''no evidence or suggestion that what has been represented by the General Counsel or by [counsel for the Union] is not entirely true.'' The parties also stipulated that there were 268 Westland cards stamped with the Region's March 12, 1990 date, the day the Union filed its petition, bearing the names of employees in the bargaining unit at that time.

In its brief to the judge, the Respondent referred to this incident and asserted that it had been deprived of an opportunity to investigate the 2-week period that the Union had possession of the cards. The judge correctly dismissed the Respondent's arguments by noting that at no time had the Respondent sought a continuance; that the 268 cards bore the Region's March 12, 1990 stamp; and that the Respondent made no suggestion of any motive for tampering with the stamped cards or how such tampering could have affected the outcome of this case.

The Respondent now states in its exceptions that the Union had the opportunity to sanitize the time-stamped cards by removing those that allegedly had been fraudulently signed. The Respondent refers to no evidence to support this allegation. We find no merit in this attempt by the Respondent to resurrect its forged-cards allegation.

Continued

ORDER

The Board's Order reported in 302 NLRB 982 (1991), is reaffirmed.

Judge Ladwig has rendered the ''full inquiry'' mandated by the court and found that John Madgwick's tale of forged cards is a ''total fabrication.'' We agree with this finding. The Respondent's innuendo in no way contravenes it.

Mark D. Rubin, Esq., for the General Counsel.
Timothy K. Carroll and *John Birmingham, Esqs*., of Detroit, Michigan, for the Respondent.
Nancy Schiffer and *Betsey Engel, Esqs*., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. On remand from the United States Court of Appeals for the Sixth Circuit, a hearing was held on January 18–21, 1994.

In an election held on May 11, 1990, at the Company's Westland, Michigan store, the vote was 274 for the Union (UAW), 8 for another union, and 179 against both. On December 26, 1990, the Board rejected the Company's objections and certified the Union. On May 15, 1991, the Board granted a Motion for Summary Judgment and ordered the Company to bargain.

On June 7, 1991, the Company filed a motion to reopen the record, alleging that it had obtained a statement from the Union's principal employee organizer to the effect that ''numerous authorization cards'' were forged and ''intentionally used by the UAW to falsely portray union strength and support from a majority of the eligible voters.'' On September 30, 1991, in the absence of ''any allegation that the employees were actually shown the allegedly forged cards,'' the Board denied the motion.

On March 1, 1993, the court remanded the case, instructing that ''the record be reopened and a new hearing held on the issue of forged authorization cards.'' At the hearing the employee organizer, John Madgwick, falsely testified that the cards submitted to support the March 12, 1990 petition were ''30 percent plus a few extras.'' He claimed that weeks later, when the cardsigning slowed, he forged 10 to 20 cards to start a bandwagon. In fact, the Union submitted 268 cards with the petition, a 61.8-percent majority of the alleged 433 employees in the bargaining unit.

In addition, Madgwick gave grossly conflicting versions of his purported forgeries in his May 10, 1991 written statement to the Company, in a June 6, 1991 affidavit, and in his January 18, 1994 testimony (in which he, changing his testimony, claimed that certain assertions he made in the affidavit were lies).

After weighing all the evidence, as discussed below, I agree with the Union that Madgwick's claim that he forged authorization cards is a ''total fabrication.''

I find that the whole basis of the Company's motion to reopen the record—that the Union used forged authorization cards to portray a false picture of majority support—is grounded on fabricated evidence.

As further instructed by the court, a May 8, 1990 campaign letter is reevaluated.

FINDINGS OF FACT

A. *The Court's Remand*

On June 7, 1991, over a year after the Union won the May 11, 1990 election at the Westland mall store—by a vote of 274 for the Union, 8 for a Commercial Workers local, and 179 against both unions (C.P. Exh. 11)—the Company filed a motion, dated May 30, 1991, to reopen the record (G.C. Exh. 1(i)), alleging that it had

> discovered evidence, and obtained a statement from the principal employee/organizer, to the effect that Charging Party UAW had forged, or caused to be forged, *numerous authorization cards* prior to the May 11, 1990 election, which cards were intentionally used by the UAW to *falsely portray* union strength and *support from a majority* of the eligible employee voters. [Emphasis added.]

In its supporting brief (attached to G.C. Exh. 1(i)) the Company alleged:

> In this case, by forging *numerous authorization cards*, the Union created a *false image*, or ''outward manifestation'' *of majority support* which operated as a ''useful campaign tool. . . .
>
> . . . .
>
> They commenced forging cards when they had obtained valid, uncoerced cards from *only 1/3 of the voting unit*. [Emphasis added.]

In making these representations, the Company was relying on a written statement given by employee John Madgwick on May 10, 1991, to Company President Dennis Toffolo and company counsel (R. Exh. 3). Regarding the number of authorization cards he claimed he had forged, Madgwick asserted in the written statement: ''Just how many I do not remember.'' He further asserted, ''At the time I did this, we had about 165 cards signed.''

To the contrary, the parties stipulated at the hearing (Tr. 190) that there are ''*268 cards* [emphasis added] in the possession of Region 7, all stamped on March 12, 1990 [the date the Union filed the election petition].'' Madgwick's claim of ''about 165 cards'' would be 38.1 percent (a little over a third) of the 433 employees alleged in the March 12, 1990 petition to be in the bargaining unit (C.P. Exh. 10). The actual number of 268 cards submitted with the petition was 61.8 percent of the alleged unit—a *clear majority*.

In its order denying the motion to reopen the record (G.C. Exh. 1M at 3, 5–6), after observing that the Union ''denies that any cards were forged'' or ''had any involvement in any alleged forgery,'' the Board denied the Company's motion, ''absent any allegation that the employees were actually shown the allegedly forged cards.''

Relying on the Company's representation of the facts, the court ruled, *Dayton Hudson Department Store v. NLRB*, 987 F.2d 359, 367 (6th Cir. 1993):

> We . . . find that the use of forged authorization cards to create a false picture of the extent of Union

> support, independent of whether the cards actually were shown to any employees, might constitute precisely the sort of pervasive misrepresentation and artful deception that we indicated in *Van Dorn [Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), discussed later] could, under the proper circumstances, be the basis for setting aside an election. . . .
>
> Because the use of forged cards to generate Union support, if this prevented employees from separating truth from untruth and affected their right to a free and fair choice, would require a different result in the proceedings before the Board, the failure of the Board to grant the motion to reopen the record was an abuse of discretion. A hearing on this issue will ensure full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentation concerning the cards occurred.

The court remanded the case to the Board with the instruction that the record be reopened and a new hearing held on the issue of forged authorization cards and also with the instruction that the Board reevaluate the May 8, 1990 campaign letter (as discussed later).

B. *Purported Forging of Cards*

1. Successful organizing campaign

Robert King, the regional director of UAW Region 1A, was in charge of the organizing campaign. He was assisted by Assistant Director Ray Westfall and other staff representatives. (Tr. 61–62, 192–193, 199–203, 208, 230–231, 269, 281–282, 287; C.P. Exh. 5.)

The organizing at the Westland mall store began in January 1990. King's strategy for a successful campaign was to obtain the support of 65 percent of the employees before releasing authorization cards for them to sign and before filing an election petition. To obtain this support, he relied on volunteers in all departments and areas of the store, to constitute an informal organizing committee. The 30 to 40 (or more) committee members contacted the employees, seeking support for the Union and determining who were for and against it. (Tr. 193–195, 197–198, 204–206, 227–228, 279.)

In committee meetings and in meetings of employees in various union halls, the Union posted large poster paper on the walls, showing the various departments and areas and indicating the number of employees, how many were prounion, how many were undecided, and how many were not in favor of the Union. This ''information gathering involving the large poster sheets,'' showing ''numbers for each department,'' continued ''right up to the election.'' (Tr. 65–66, 195, 198, 205–206, 209, 213–215, 279–281, 284–286, 297.)

Finally, after spending ''a lot of time'' assessing the union support at the store, through ''committee meetings and the charts,'' Director King determined that the Union had achieved the support of 65 percent of the employees and decided to release the authorization cards for them to sign (Tr. 205–206, 227–228). The Union issued a notice to the employees (R. Exh. 2), announcing that ''The UAW's cards will be handled at the membership meeting on *Sunday, March 4 at 6:30 p.m.*'' About 175 or 200 employees attended the meeting and 161 of them signed authorization cards that evening. Committee members and others took cards back to the store to be signed. (Tr. 206–208, 228, 242, 273, 282–283.)

Cards were being signed at such a fast pace, showing ''very positive and very strong'' support, that on Thursday of that same week, March 8, 1990, Director King determined that the Union had the support of 65 percent of the employees. He authorized the filing of a petition and on Monday, March 12, Assistant Director Westfall filed it (in Case 7–RC–19227), alleging 433 employees in the unit. As found, Westfall submitted 268 authorization cards (61.8 percent) in support of the petition. (Tr. 190, 208, 212, 243, 264–266.)

After the Union filed the petition, the focus of the organizing committee was to maintain the Union's ''support with the people who had committed support to the UAW.'' As credibly testified by Director King (who, by his demeanor on the stand, impressed me most favorably as a truthful, forthright witness), ''we had the necessary cards to have an election. Now it was a matter of winning the election'' (Tr. 210, 212–215):

> Q. At the point that the petition was filed on March 12th, but before you had the *Excelsior* list [about April 11], was there a continued push at that time to collect additional cards?
>
> . . . .
>
> A. No. We were very, very happy with the support we had and the really strong support, or I would call overwhelming support we had. . . .
>
> . . . .
>
> Q. What did [the organizing committee] do after the petition was filed?
>
> A. They went back and contacted all their coemployees and found out what the company was doing, what things the company was saying, what was the response to the different company literature. Would keep us abreast of current issues on almost a day-to-day basis of what was going on in the store.
>
> Q. Were they given duties with respect to card distribution or collection after the petition was filed?
>
> A. No, if they got an additional card and they turned it in, that was fine.

Committee member Jacquelyn Garner credibly testified that the committee had no role in soliciting authorization cards after the Union filed the petition. The members ''would accept a card if someone handed it in, but to actively solicit them, no.'' (Tr. 284–286.) Mary Grab, the cochairman of the committee, credibly confirmed that after the petition was filed, employees were not urged at union meetings to collect more cards, and no committee member that she knew of solicited cards (Tr. 244–245, 254). (By their demeanor on the stand, both Garner and Grab appeared to be truthful witnesses.)

As Assistant Director Westfall credibly testified, the only signed cards he received after filing the petition were about ''a dozen or so'' from Madgwick. Because ''We already filed the petition,'' he told Madgwick that ''those cards would be kept in the safe.'' (Tr. 266–268, 272.) The parties stipulated (Tr. 320) that there were 16 of these cards (about which Westfall testified), that 1 was a duplicate signed March 28, and that 1 was not dated. Among the other 14

cards, 2 were dated March 10 (the Saturday before the March 12 petition), 2 were dated March 12 (the date of the petition), 2 on March 26, 1 each on March 14, 17, 25, 27, and April 2 and 4 (all before the April 11 *Excelsior* list), and on April 19 and 25 (after the *Excelsior* list).

When the Company and Union met at the Regional Office to sign a stipulated election agreement and set a date for the election, the Company ''said we will let you have this date [May 11] for the election if you allow us to include the leased areas.'' The Union agreed, ''rather than delaying the election.'' (Tr. 229, 255.)

The *Excelsior* list, which the Union received about April 11, 1990 (C.P. Exhs. 6, 7), contained the names of 537 employees (104 more than the Union had calculated would be in the bargaining unit). The list included not only employees in leased departments, but also some persons who were no longer working there and some who had died (Tr. 209–211, 229, 285).

The organizing committee was not assigned to solicit the added employees to sign cards (Tr. 230–231, 244–245, 284). King credibly testified (Tr. 210–211):

> Q. After you received the *Excelsior* list, was there then a push to gather additional cards?
>
> A. There was a push and scramble to find out all the people who were on that list, to have somebody contact them and find out their support of the union. It wasn't necessary for a push of cards at that point, it was to build support and gain support among the additional people on the list.
>
> Q. Why do you say it wasn't necessary?
>
> A. Because we had filed the petition already, we had the necessary cards to have an election. Now it was a matter of winning the election.
>
> . . . .
>
> [I]f somebody wanted to sign additional cards they could, but our main thrust or main push was to identify all the people and then to win the support of those in the leased departments.
>
> . . . .
>
> Q. Did you ever tell John Madgwick that if 65 percent of the employees didn't sign cards that you would delay the election?
>
> A. No.

When the members of the organizing committee sought out and talked to employees in the leased departments, the Union received their ''overwhelming support'' (Tr. 255). In the May 12, 1990 election, the Union received 274 of the 461 valid votes counted—a majority of 59.4 percent (C.P. Exh. 11).

2. Madgwick's fabricated testimony

a. *His motivation*

Furniture ''sales consultant'' John Madgwick played a prominent role in the organizing campaign. He attended the first organizing meeting in January 1990 at the home of employee Mary Grab and he and Grab were informally selected by the employees to be cochairmen of the organizing committee (Tr. 27–28, 60, 199, 201–202, 226). At the March 4, 1990 union meeting, where 161 of the employees in attendance signed authorization cards, he volunteered to use vacation time early that week to collect cards from employees who did not attend the meeting (Tr. 19, 68).

Madgwick collected cards at the Coney Island (a restaurant located in the mall near the store) on Monday and Tuesday, March 5 and 6. Grab relieved him after her store hours both those days and also on Wednesday, her day off. (Tr. 19, 37, 68–70, 243.) Madgwick turned the signed cards in to Assistant Director Westfall (Tr. 37, 264–265, 269–270, 283–284). As found, Director King decided on Thursday, March 8, to authorize the filing of the petition, and the following Monday, March 12, Assistant Director Westfall filed it with 268 cards. Also as found, Madgwick turned in to Westfall the few signed cards that Westfall received between that time and the election.

After the Union won the election on May 11, 1990, the Union chartered a separate local for the Westland mall store employees. To avoid ''bad feelings'' between Madgwick and Grab, the Union set up the local to divide the top leadership in the local between two elective offices, a president and a chairman of the bargaining committee. The members elected Grab to be president and Madgwick to be the chairman. (Tr. 88–89, 218.)

During the following months there were various occurrences or expressed attitudes that may have influenced Madgwick in deciding to turn against the Union, to campaign against it at the Company's Fairlane mall store, and to give fabricated testimony in an obvious effort to overturn the Union's election victory at the Westland mall store.

Madgwick opposed Grab as president being involved in negotiations with the Company. Although being assured that as committee chairman he would be lead spokesman, he ''was not happy with that.'' As Director King further credibly testified, Grab as president had a role in going out to other locals and Madgwick ''did not seem to appreciate her getting that recognition.'' Madgwick thought that one person should be clearly in charge of the local union and should handle the responsibilities of both president and bargaining committee chairman. (Tr. 218–219.)

About September 1990, in the parking lot after a union meeting, Madgwick told Fairlane mall store employee Leonard Militello and other employee organizers that ''we have to get off the women's issues'' and have the ''big-ticket'' employees (the higher-paid commissioned sales consultants in furniture, carpets, etc.) control this union. (Tr. 54–55, 301.)

Later, in March 1991, Madgwick attended a union meeting at the Fairlane mall store during the Union's organizing campaign there. After the meeting Madgwick told Militello his opposition to ''the idea of seniority rights, people having a right to bump into his department that had more seniority than him.'' He also expressed his opposition to the local union president's having ''the right to be at the bargaining table and to have input at the bargaining table.'' He said ''we are losing control of the [organizing] campaign'' and complained that ''women's rights were becoming more and more prevalent and he did not want women to be involved in this thing. He wanted big-ticket to control this.'' (Tr. 301–304, 307.)

I discredit Madgwick's claim (Tr. 89) that ''I don't know why I would be unhappy about'' the local union president being able to sit in on bargaining sessions and that ''I don't

recall saying anything like that.'' I also discredit his claim (Tr. 90) that ''No,'' he did not make statements to other employees that he wanted the big-ticket employees to control the local.

On April 27, 1991, as stipulated (Tr. 320–321), the Company erased a $8,055.79 deficit in Madgwick's commission account, along with larger and smaller deficits in the accounts of other commissioned sales consultants in the Company's stores. Because of the deteriorating economy, as Benefits and Compensation Coordinator Owen Oakley credibly testified (Tr. 162–168), these employees had been drawing more money than their monthly commissions, and the accumulated deficits prevented them from earning more than their draw in high-sales months. I discredit Madgwick's claim (Tr. 58, 94) that this 1991 deficit was not erased until 1993—long after he turned against the Union.

About April or May 1991 Jacquelyn Garner, a design assistant in the furniture department, observed ''company people'' going to Madgwick's desk and talking to him on a daily basis. While relieving the furniture receptionist during lunch, she was receiving phone calls from ''company people asking to talk to John Madgwick.'' Two of the calls were from Company President Dennis Toffolo. (Tr. 288–290.) I discredit Madgwick's claim (Tr. 53) that Toffolo had not called him at work.

Meanwhile, Director King and Assistant Director Westfall were seeking a meeting with Madgwick and he was asking for a meeting with them (Tr. 41, 51–53). As King credibly testified, ''We had heard some concern from employees that he was meeting with management'' and, in particular, that he had met with President Toffolo (who became the head of the department store division after the Union's election victory at the Westland mall store). King credibly explained: ''We had experience where Dennis Toffolo had met with people from the Pontiac store and had convinced them not to support the UAW.'' (Tr. 56, 216, 220.)

In Madgwick's meeting with King and Westfall at the Bakers Square Restaurant near the Westland mall store, Madgwick again expressed his overall concern about his and President Grab's roles in the local and repeated his contention that one person should be clearly in charge of the local union and handle the responsibilities of both president and chairman of the bargaining committee (Tr. 215–219).

Madgwick acknowledged in the meeting that he had met with President Toffolo (evidently referring to his meeting on May 10, 1991, with Toffolo and the attorney). It was in the meeting with King and Westfall that he made the claim about forging authorization cards. As King credibly testified, there had never been any statement by anybody of ''even the possibility'' of forged cards and ''I really questioned what was the motivation for him saying that.'' (Tr. 219–222.)

In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2, first identified as C.P. Exh. 1), given in another proceeding, he swore that this meeting was held on Tuesday, May 21, 1991 (16 days before he gave the affidavit). At the January 18, 1994 hearing, however, he claimed (Tr. 41, 51–52) that ''actually'' it was the end of April, ''*April 21st* [emphasis added], I believe.'' In view of his acknowledgment to King and Westfall that he had already met with Toffolo (evidently on May 10), I infer that May 21, 1991, is the correct date.

On May 31, 1991, Madgwick distributed a memo to the Westland mall store employees (C.P. Exh. 8), announcing that ''I feel I must sever my association with the UAW.'' He acknowledged (Tr. 91) that after meeting with Toffolo, he went into the Fairlane mall store to campaign against the Union and ''talked to employees and attempted to gain the employees' support against the UAW.''

b. *Purported forgeries*

(1) False premise

As found, Madgwick first claimed that he had forged union authorization cards after the Company erased a $8,055.79 deficit in his commission account and after Company President Toffolo telephoned him on the job (contrary to Madgwick's denial).

Madgwick made the claim in a written statement to Toffolo and the attorney in a meeting on May 10, 1991 (a year after the Union's election victory at the Westland mall store). At the hearing he gave conflicting versions of the circumstances of that meeting (Tr. 107–109):

> Q. Did you have [the statement] written out when you went to the meeting?
>
> A. No.
>
> Q. No. You wrote it up during the meeting?
>
> A. During the talk.
>
> Q. You wrote it up after you had talked to attorney Tim Carroll and Dennis Toffolo?
>
> A. Actually I think I did it before I talked to either of them. I am not sure, but I think I wrote it up first before I talked to them at the meeting. I think—
>
> Q. You had the meeting and you don't talk about anything and you sit there and are writing out this statement and then you talk?
>
> A. Yes, I think that is how it happened. I am not positive, but I believe that is how it happened.
>
> . . . .
>
> Q. And you just start writing?
>
> A. They asked me to make a statement and I started writing the statement.
>
> Q. They didn't know what it was going to be about?
>
> A. No.
>
> Q. No discussion with them before you started writing?
>
> A. Not to my knowledge.

From his demeanor on the stand, Madgwick did not impress me as being a candid witness. I infer that in giving this conflicting testimony, he was attempting to conceal his prior arrangement with President Toffolo that the attorney would be present to witness the statement concerning his claim that he forged authorization cards.

On reviewing the May 10, 1991 statement (R. Exh. 3), Madgwick's June 6, 1991 affidavit (G.C. Exh. 2), and his lengthy testimony at the remand hearing on January 18, 1994, I find it apparent that his various versions of the details of the purported forgeries are based on a false premise.

The false premise—belied by a stipulation of the parties at the remand hearing—is that the March 12, 1990 petition was supported by ''only 1/3 of the voting unit'' (the number that the Company represented to the Board and the court was the number of ''uncoerced cards'' when the forging of cards began). The parties stipulated (Tr. 190) that Region 7 was in possession of *268 cards*, ''all stamped on March 12, 1990.''

These 268 cards, submitted as the Union's showing of interest on that date, constitute 61.8 percent of the alleged 433 bargaining unit employees.

(2) Madgwick's conflicting versions

(a) *Number of signed cards*

As found, Madgwick claimed in his May 10, 1991 written statement (R. Exh. 3) that at the time he forged cards, ''we had about 165 cards signed.''

At the remand hearing, Madgwick first testified (Tr. 31) that the March 12, 1990 petition was supported by ''30 percent plus a few extras.'' He later testified (Tr. 70) that when the petition was filed, the Union had ''Better than 30 percent'' or ''about 130, 140, in-between there.'' When shown his June 6, 1991 affidavit (G.C. Exh. 2 at 5), stating that ''Within 3 days of the start of distributing cards, we received 162 cards,'' he claimed (Tr. 72–73) that was the correct number of cards submitted with the petition.

That claimed number of 162 cards would be 37.4 percent of the alleged 433 employees in the bargaining unit. In fact, as found, instead of 162 cards being received within 3 days *after* the authorization cards were released for signature at the March 4, 1990 union meeting, there were 161 cards signed at that union meeting. I discredit Madgwick's so-called ''guess'' (Tr. 18, 67) that there were only 50 employees at the meeting (instead of 175 to 200, as found).

As further found, the only signed cards that the Union received after it filed 268 cards with the March 12 petition were 16 cards Assistant Director Westfall received from Madgwick, 1 undated and 15 dated from March 10 to April 25, 1990.

There is no claim that any of these 16 cards was forged (Tr. 320).

(b) *The 65-percent requirement*

As found, Director King followed a policy of obtaining the support of 65 percent of the employees before releasing authorization cards for signature and before filing a petition. In one of Madgwick's versions of the facts he recognized this policy, but elsewhere he distorted it, obviously to support his claim that cards were still being solicited after the petition was filed.

In his affidavit (G.C. Exh. 2 at 3) Madgwick gave his version of a telephone call he received from cochairman Grab, evidently during the week of March 4, 1990, when they were collecting cards at the Coney Island before the Union filed the petition on March 12. In Madgwick's words, ''Grab said that *Bob King would not file a petition* [emphasis added] until at least 65% of the proposed unit signed cards.'' (This telephone call is discussed later.)

At the hearing, however, when claiming that the solicitation of cards continue *after* the petition was filed, he gave a different version of King's policy. He claimed (Tr. 19–20, 31–32):

> [W]e had to have 65 percent or better cards signed by employees *before Bob King would hold an election for us*.
>
> . . . .
>
> A. Bob King told us this.
>
> . . . .
>
> A. The petition was 30 percent plus a few extras. Again, *Mr. King would not hold an election* at Westland until we maintained or we got to 65-plus percent cards.
>
> Q. This was even after the official petition had been filed?
>
> A. Yes.
>
> . . . .
>
> A. He said *he would delay it* until we reached 65. [Emphasis added.]

I discredit this testimony as a fabrication. As found, King credibly denied that he ever told Madgwick he would delay the election if 65 percent of the employees did not sign cards.

(c) *Number of purportedly forged cards*

In Madgwick's May 10, 1991 written statement to President Toffolo and the attorney (R. Exh. 3), Madgwick denied knowing how many cards he forged, stating ''Just how many I do not remember.''

In his June 6, 1991 affidavit (G.C. Exh. 2 at 3–4), he twice stated that he forged ''10 to 20'' union cards. He also claimed (at 5) that the *total* number of cards turned over to the Union before the election was ''Approximately 274.'' At the hearing he claimed again (Tr. 30) that he forged between 10 and 20 cards.

I note that the court, in remanding the case (987 F.2d at 366–367), observed that ''as developed both in the briefs and during oral argument,'' the cards had not been shown to employees. In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2 at 4), Madgwick swore, ''I did not show the forged cards to other employees.'' Yet, at the remand hearing, he claimed that he *had* shown forged cards to employees (Tr. 107):

> A. I told [employees] a lot more people are starting to sign, so they *all started signing again*, yes.
>
> . . . .
>
> Q. Did a lot more people sign cards?
>
> A. After I forged the cards, then *showed them the cards* and a lot more people started signing cards, yes.
>
> Q. What is a lot?
>
> A. *Fifty*, I can't give a number, just a lot more people were signing cards.
>
> Q. [Than the number of] Cards you forged?
>
> A. Yes. [Emphasis added.]

I discredit, as a fabrication, this belated claim that he showed employees forged cards.

I find that this testimony is fabricated for another reason. It is stipulated that the number of cards stamped March 12, 1990 (showing that they were submitted with the petition) was 268. If Madgwick had turned in to Westfall 10 to 20 forged cards in addition to the 268 cards, and if employees ''all started signing again'' and he also turned in those valid cards as well, the total number of cards turned in to Westfall would be far larger than the ''Approximately 274'' cards that Madgwick claimed was the total number.

As found, Westfall credibly testified that the only cards he received after he filed the March 12 petition were the ''dozen or so'' kept in his safe—referring to 1 undated card, 1 duplicate card, and 14 others, none of which was forged.

(d) *When purported forgeries occurred*

Madgwick repeatedly testified that he did *not* forge any of the cards submitted with the March 12, 1990 petition (Tr. 73–74).

At the hearing, he first claimed that he forged cards ''When it slowed down,'' about ''Two weeks, a week later'' after the petition was filed. He denied recalling when it was, claiming that it might have been ''the next week, the following week.'' (Tr. 75.) If true, this would have been the third or fourth week in March. In his affidavit (G.C. Exh. 2 at 3) he claimed that he forged union cards ''from about late March 1990 to about early April 1990.'' Yet, he gave inconsistent testimony at the hearing, claiming (as discussed below) that he took names from the *Excelsior* list, which was dated April 11, 1990.

Although the Union had already made a 61.8-percent majority showing of interest, submitting 268 cards with the March 12 petition, Madgwick claimed that ''when we got *between 40 and 50 [percent*] is when [the cardsigning] really slowed down'' (Tr. 76, emphasis added). Previously, in his June 6, 1991 affidavit (G.C. Exh. 2 at 5), Madgwick swore: ''*Thirty percent* [emphasis added] of the employees had signed union cards before the decision was made to forge union cards.''

(e) *Names used in purported forgeries*

Madgwick also gave conflicting testimony about the names he forged. He insisted that he could not recall any of them. He first claimed, in his May 10, 1991 statement to the Company (R. Exh. 3), that ''I used some employees names and *just anyones* [emphasis added].''

In his June 6, 1991 affidavit (G.C. Exh. 2 at 4), he swore:

> I forged the names of those *employees who had stated they were interested in the UAW*, but had not signed cards. I also forged the names of *employees who stated that they were not interested in the UAW*. I cannot recall the names of those signatures I actually forged. [Emphasis added.]

At the hearing he gave various versions of the names he used. He first testified (Tr. 30–31):

> A. Most of them were off the Excelsior list, yes.
> Q. Were there any other names?
> A. Yes.
> Q. Approximately how many other such names?
> A. A few. I have no idea how many names were on the Excelsior list. No.
> Q. Were these just names you make up or something.
> A. Names of *acquaintances* I had known.
> Q. Do you remember any of the names that you filled in?
> A. No. [Emphasis added.]

Later that same day he testified (Tr. 77–79):

> Q. For the nonemployees, did you use names of *people you knew*?
> A. *No, just out of the hat*, maybe somebody I met, I just put a name down. Maybe even a customer, I don't know. I couldn't tell you the names, I really can't.
> Q. Did you make up the names or were they real names of people you knew?
> A. More than likely real names, but I am—
> Q. More than likely?
> A. Yes.
> . . . .
> Q. For the *names that you made up*, did you write in a job title?
> A. Yes.
> Q. You just made those up, too?
> A. Salesman, yes. [Emphasis added.]

Madgwick next claimed that the names he took from the *Excelsior* list were *not* employees he knew, that he ''just took them off at random'' (Tr. 82):

> Q. You would put in the signature for the person?
> A. Yes.
> Q. *First* and last name?
> A. Yes. [Emphasis added.]

I find that this last answer is obviously fabricated. As the Union points out in its brief (Br. 17), ''the Excelsior list does not contain first names, although Madgwick claimed he copied both first and last names off this list'' (C.P. Exh. 7).

(f) *Purported knowledge of Union*

As the Union also points out in its brief (Br. 14), Madgwick's May 10, 1991 written statement to the Company (R. Exh. 3) ''does not accuse the Union of suggesting, participating in, condoning, or even knowing about his alleged forgeries.''

In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2 at 4, 6), he swore:

> In or around late March 1990 or early April 1990 I gave the cards I forged to Ray Westfall. I did not tell him that the cards were forged. . . .
> . . . .
> I do not know if either Ray Westfall or any other union representatives knew that I forged union cards. I did not discuss the card forging with the UAW. . . . The UAW did not ask me to forge union cards.
> I never told Westfall or any other UAW representative that I forged union cards until after the election in May 1990.

Contrary to these unequivocal sworn assertions, Madgwick claimed at the hearing that he did inform Westfall about forged cards before the election (Tr. 40):

> Q. What did you tell him or what did he tell you at that time?
> A. We were sitting at the table [at Coney Island] when I turned them in and I reached across and said, *here are some of the forged cards*. I handed them to him.
> Q. What did Mr. Westfall respond, if anything?
> A. *I didn't hear that*. [Emphasis added.]

On cross-examination, Madgwick claimed that he was lying in the affidavit (Tr. 95–96):

> Q. In other words, you lied?
> A. I did.
> Q. You knew you were under oath at the time you lied?
> A. Yes.
> . . . .
> Q. Is it your testimony that you lied, but you thought you had good reason to lie?
> A. Yes.

As a justification for changing his testimony, Madgwick claimed (Tr. 87) that when he gave the affidavit he had ''a very strong relationship with Ray Westfall and I didn't want Ray Westfall involved in this.''

I credit Westfall's denials and his testimony (Tr. 266–268, 271) that the first he learned about any allegation of forged cards was a year later when Madgwick told Director King and him at Bakers Square that Madgwick had forged cards. I discredit, as a fabrication, Madgwick's repudiation of the earlier sworn assertions.

I also discredit, as a complete fabrication, Madgwick's following claim (Tr. 22)—contrary to Westfall's specific denials (Tr. 267–268):

> Q. What, if anything, did you do in response to this difficulty you encountered in getting more and more cards for Bob King?
> A. *I asked* Ray Westfall one time when we were walking towards Coney Island, we were having a slow time getting cards signed, *if I signed cards*, what happens to the cards that we turn in to him or to Bob King. Ray Westfall said, the cards will go down to [the] UAW safe, they will not leave there and no one will see them, no one will get them. You do what you had to do, but *if you are going to forge cards don't tell Bob King*. [Emphasis added.]

This conversation undoubtedly would not have occurred during the week before the petition was filed, when a large majority of the employees were signing cards. Neither would it have occurred after the petition was filed because, as found, Director King never told Madgwick that he would delay the election if 65 percent of the employees did not sign cards.

I also discredit Madgwick's testimony about forging cards to get more employees committed and ''on the band wagon, to get the thing rolling again because it had slowed down'' and his testimony about how he would turn in cards, including forged cards, to Westfall at the Coney Island *after* Westfall filed the petition. He claimed ''we would show how many cards we have and say eight more today, ten more today. We were very boisterous at Coney Island about signing cards.'' (Tr. 37–39, 49.)

I infer that Madgwick fabricated this testimony to support the Company's position on ''the use of forged authorization cards to create a false picture of the extent of Union support.'' Westfall credibly testified (Tr. 269) that Madgwick delivered cards to him at the Coney Island only when Madgwick was there on Monday and Tuesday, March 5 and 6 (after cards were released at the March 4 union meeting). Moreover, cards were not turned in 8 or 10 at a time after Westfall filed the petition. As found, Westfall credibly testified that he received only about ''a dozen or so'' after that.

(3) Grab's telephone call

Madgwick testified about a telephone call that he claims was the cause of his forging authorization cards. I find, however, that although there was a telephone call, it was placed before the March 12, 1990 petition was filed—not afterward when Madgwick claimed he forged cards and not his version of the call.

In Madgwick's June 6, 1991 affidavit, he gave his version of the telephone call that he received from Mary Grab, cochairman of the organizing committee. Because of his statement in the affidavit (as quoted below) that Director King would not ''file a petition'' until they reached 65 percent, I infer that he received the call from Grab on Wednesday, March 7, 1990. That, as found, was Grab's day off when she relieved Madgwick at Coney Island where, on Monday and Tuesday following the Sunday, March 4 union meeting, he had been collecting signed authorization cards from employees. At that time, they were short a few cards of reaching 65 percent of the estimated 433 employees in the bargaining unit. (The 65 percent would be 282 cards, 14 more than the 268 cards submitted with the March 12 petition.)

Madgwick asserted in the affidavit (G.C. Exh. 2 at 3–4):

> I forged the union cards *because* Mary Grab called me at home and told me that we could not get anymore cards signed. Grab said that *Bob King would not file a petition* until at least 65% of the proposed unit signed union cards. Grab told me that, ''Paul [Grab's husband] is going to sign some cards. My daughter is here with her girlfriend and they said they would sign some cards. Why don't you sign some cards and your wife. And if you have neighbors, why don't you have them sign some?'' I agreed, but I did not ask my wife or anyone else to forge cards. Grab did not tell me how many cards she actually forged or if she in fact forged any union cards. This was the first and only discussion I had with Mary Grab about forging cards. [Emphasis added.]

I find the evidence to be clear that such a telephone call could not have caused Madgwick to forge authorization cards. The next day, March 8, Director King authorized the filing of the petition. Madgwick concedes that he did not forge any cards that week, before the petition was filed on March 12. After the petition was filed, there was no need to obtaining additional cards to enable King, under the 65-percent policy, to ''file a petition.''

At the hearing, Madgwick completely omitted any reference to King's not being willing to ''file a petition'' until 65 percent of the employees signed cards. He instead implied (Tr. 22–23, 29–30) that he received Grab's telephone call *after* the petition was filed, by claiming (falsely, as found) that he had already discussed forging cards with Assistant Director Westfall.

Grab acknowledged that she placed such a call to John Madgwick, calling him (Tr. 248) ''just to touch base.'' She credibly testified (Tr. 246, 248, 252):

A. I called John at home one day and it was a flippant, stupid remark and I just said, hey, I can sign cards and Paul can sign cards and my daughter and her friend can sign cards, and it was a stupid remark made to lighten the situation. It was a very intense [time], and we had never been through an election or situation like this before and it was just to kind of relieve tension. I said it and then it was done and forgotten.

. . . .

A. I don't recall him saying anything. . . .

. . . .

A. [I]t was just something to break the ice, something to laugh about briefly. It was a very stupid thing to do. Therein lies my guilt.

. . . .

Q. Other than signing your own card, did you sign anybody else's card?

A. No.

I infer that Madgwick was aware at that time that Grab was not serious. But even if not, he later realized that she was not serious about forging cards, because she never mentioned the subject again and never gave him any forged cards to turn in to Westfall.

I find that Madgwick was a most untrustworthy witness.

3. Other purported forgeries

After Madgwick conceded that he did not forge any of the (268) authorization cards that were submitted to support the March 12, 1990 petition, the Company called four other witnesses to testify about alleged forgeries.

One of them, former employee Winifred Wiacek, answered ''65 percent'' to a leading question about the number of cards required before ''proceeding to an election'' (Tr. 152):

Q. Was there any goal or directive set by the UAW in terms of the number of cards it would insist upon *before proceeding to an election*?

A. Yes, the 65 percent was accurate and it was to make sure that we won the election. [Emphasis added.]

She then explained, ''I argued that . . . 30 percent was enough *to file for an election* [emphasis added], but to win an election you needed more than 30 percent.'' I infer that she equated ''proceeding to an election'' in the leading question with ''filing for an election.'' She next testified (Tr. 154):

I felt no need to go forward [after the first two days of cardsigning] and get more cards, especially after we filed the petition to have an election. I thought to keep people on board and talk to them and make sure they are still with us, but to sign more cards, to me, at that time seemed rather fruitless.

Q. In your personal effort did you stop attempting to have cards signed approximately at that time?

A. My role wasn't so much getting cards signed, but to make sure people who signed, to keep them on board or that management didn't intimidate them.

Thus, this company witness confirmed that the Union did not require a 65-percent showing of interest before it would proceed to an election.

Another witness, Christine Amos, who was on the organizing committee but who did not solicit any cards, claimed that Director King said ''He wanted 65 percent of the *Excelsior list* [emphasis added] in signed cards,'' because ''if an employee signed an authorization card that made them feel more of a commitment to vote yes.'' She claimed that he said this ''At least a dozen times'' at union meetings that were held ''Almost every Sunday'' before the election. (Tr. 170–173.) I note there were only *four* Sundays between the April 11 date of the *Excelsior* list and the May 12 date of the election. I also note that she was a social friend of Madgwick, seeing ''each other socially outside of the worksite'' (Tr. 175).

Although, as found, there were only 16 cards turned in to the Union after the March 12 petition, Amos claimed (Tr. 173–174) that she saw people handing in cards during that time ''At least a dozen times or more, multiple cards . . . sometimes individual.'' I discredit these claims, as fabricated to support the Company's cause.

The evidence establishes that the two other witnesses, Rosemary Minni and Suzann Roberts, did engage in forgery, but both did so *before* the March 12 petition was filed.

Employee Rosemary Minni credibly testified that she signed the name of employee Nancy Sellar, with whom she had talked about the Union, but who was absent because of a mother with cancer. I discredit Minni's claim that although she signed her own card within the first 3 days after the March 4 meeting, she signed Sellar's card ''maybe within the next two weeks'' (that is, *after* the petition was filed). As discussed below, the card was 1 of the 268 cards submitted with the March 12 petition. (Tr. 118–122.)

I also discredit Minni's claim, contrary to Westfall's credited testimony, that shortly before the election she overheard Madgwick and Westfall discussing forged cards and Westfall saying, ''I did not hear that''—although she could remember virtually nothing else about the conversation (Tr. 111–118). She impressed me by her demeanor as not being a candid witness.

Employee Suzann Roberts credibly testified (Tr. 138–139):

Q. Did you sign any cards for other people with permission?

A. Yes.

Q. Those are situations in which the other person for some reason was unavailable to sign?

A. Yes.

An examination of the cards revealed that, besides Sellar's forged card, there were only 3 other forged cards, dated March 5, 1990, among the 268 cards submitted with the March 12 petition (Tr. 320). To preserve the confidentiality of the cards, as the Company revealed in its brief (Br. 21–22): ''During the final 2 days of the hearing, Judge Ladwig supervised the examination of authorization cards by experts retained by [the Company and Union], respectively.'' I infer that the three forged cards, dated March 5, were the cards signed by Roberts with permission.

I do not credit her testimony concerning *when* she forged these cards. According to her (Tr. 137–138), she had no difficulty soliciting signatures the ''first couple of days''

(March 5 and 6, 1990), but ''After the first two or three days it dried up.'' She claimed she heard ''Over and over'' from King and Westfall that they had to get 65 percent before ''we would have a vote.'' She further claimed that when she ''reached this period where the cards dried up,'' she worked ''even harder'' to get more cards and then signed cards for absent employees who gave their permission. To the contrary, the three forged cards are dated March 5, the first day after the cards were released for signature at the Sunday evening, March 4 union meeting.

I discredit as well Roberts' claim that she also forged ''I would say a few cards, approximately three or five,'' using names of nonemployees. She denied having ''any specific recollection of when you turned these in or what was said or what was done when you turned them in, who you gave the cards to'' or any ''specific information about that particular occasion.'' (Tr. 140, 144.) Like Minni, she did not impress me as being a candid witness.

I consider it obvious that the 4 forged cards (3 with specific permission) that were included in the 268 cards submitted with the petition could not have influenced the outcome of the election in any way.

4. Contentions of the parties

Apparently referring in large part to the massive conflicts in Madgwick's versions of what happened, the Company contends in its brief (Br. 7) that ''Not surprisingly, almost four years after the occurrence of the events being described, the testimony on the forged cards issue was at times conflicting and at other times simply confusing.'' To the contrary, I find that Madgwick deliberately fabricated testimony to help the Company's cause.

The Company ignores Madgwick's recognition—in his June 6, 1991 affidavit—of Director King's 65-percent policy for when to *file a petition*. It contends in its brief (Br. 30) that a ''critical fact,'' which ''cannot be disputed,'' is that King ''insisted upon a 65% threshold of signed authorization cards, as evidence of support from the bargaining unit, before he would *proceed with an election* [emphasis added].'' To the contrary, as found, King's policy was to obtain the support of 65 percent of the employees before he would release cards for them to sign and before he would *file a petition*.

Disputing the credited evidence to the contrary, the Company contends (Br. 33) that ''It is inconceivable that only 15 or 16 cards were collected during that two-month'' period between the filing of the March 12, 1990 petition and the holding of the May 11, 1990 election. It insists, ''Where are the rest?'' disputing Assistant Director Westfall's credited testimony that those few cards were the only ones he received after he filed the petition.

The Company concludes (Br. 40): ''Finally, the Board failed to advise [the Company] of its error in returning the cards to the UAW until the second day of the hearing, thus depriving [it] of a meaningful opportunity to investigate the events of that two-week period or the UAW's handling of the cards.'' This refers to the Region's inadvertent return of the Westland mall store cards (instead of Fairlane mall store cards) on November 9, 1992, to the Union which, when its counsel discovered the error, hand-delivered them back to the Region 7 on November 23, 1992. (Tr. 185–188.)

The Company has not sought a continuance to investigate the matter. All 268 of the cards bear the Region's March 12, 1990 stamp (Tr. 190). The Company has made no suggestion of any motive for someone's tampering with the stamped cards, or how any tampering could have affected the outcome of this case.

The General Counsel contends in its brief (Br. 3) that Madgwick's testimony is ''inherently unreliable.'' He concludes (Br. 4–5) that ''with no evidence of an organized union campaign of forging cards, no credible evidence of widespread forgery, and a record demonstrating that a maximum of less than two percent of all cards may have been signed by someone other than the employees named . . . in circumstances that may or may not have involved forgery, it is clear that the Sixth Circuit's *Van Dorn* standard of 'pervasive misrepresentation' has not been met'' by the Company.

The Union contends in its brief (Br. 5–7) that there were no forged cards and that the evidence totally discredits the Company's principal witness (Madgwick) and ''clearly and dispositively shows that forged cards played absolutely no role'' in the organizing campaign:

> [T]he evidence of forged cards and their use was a *total fabrication* by an employee who became disgruntled by his inability to control the course of the organizing campaign. . . . [The Company] used his patently and obviously false testimony to delay the bargaining rights of its employees who voted for UAW representation by an almost 100 vote margin four long years ago. The paucity of evidence offered to support [the Company's] claims suggests that the [Company] frivolously initiated its motion to reopen the record in a conscious, deliberate attempt to hinder the bargaining process at the Westland mall store and the organizing efforts at its other area stores.

The Union also contends (Br. 25) that Madgwick took advantage of a joke made by Mary Grab to weave a fairy tale about forging cards and using them to induce employees to join the union cause.

5. Concluding findings

1. Credible evidence at the remand hearing establishes that no authorization cards were forged by John Madgwick or anyone else after the Union filed the petition on March 12, 1990, contrary to the Company's representations to the Court of Appeals for the Sixth Circuit.

2. Four authorization cards, signed during the week of March 4, 1990, and included in the 268 cards submitted with the March 12, 1990 petition, were forged without the knowledge of the Union.

3. These four cards (three of them signed with specific permission of absent employees) did not influence the outcome of the election in any way.

In direct response to the court's questions concerning the issue of forged authorization cards, I find as follows:

Regarding ''how many authorization cards were forged'': four.

Regarding ''the actual use to which those cards were put'': They were submitted by the Union, without knowledge of the forgery, with its March 12, 1990 petition as part of its showing of interest, which consisted of 268 cards signed in the first week after the cards were released for signature at a union meeting on March 4, 1990.

Regarding ''when these incidents occurred'': Three of the forged cards were signed and dated March 5, 1990, with the specific permission of absent employees and the fourth card was signed that same week, before the March 12, 1990 petition was filed.

Regarding ''whether and in what context any misrepresentations concerning the cards occurred'': none.

C. *Campaign Letter Reevaluated*

1. Prior rulings

About May 8, 1990 (3 days before the May 11 election), as the evidence in Case 7–RC–19227 shows, the Union mailed in UAW Region 1A envelopes from the region's office (Tr. 28, 30–32, vol. I) a letter to bargaining unit employees with the greeting, ''Dear Fellow Hudson's Employee.'' The long letter (E. Exh. 3, vol. 2) contains arguments critical of the Company and its so-called antiunion ''scare tactics.'' It concludes with an appeal for a yes vote and bears the printed signature of the Union's organizing committee, as follows:

> By our joining the UAW, we guarantee ourselves a voice in our future. On May 11 vote to give yourself a meaningful voice in decisions that impact your life—VOTE YES FOR THE UAW. [Emphasis in original.]
>
> Your Fellow Workers
> *The Westland Employees*
> *Organizing Committee* [Emphasis added.]

The letter contains a gross misrepresentation of the Company's profits. In the fifth of nine paragraphs, the letter states that the Company is ''So profitable that they . . . (3) claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year'' (emphasis in original). In fact, the total sales in 1989 were $52.5 million and the profits were only $1.4 million. The letter contains a number of references to ''we'' and ''us,'' although it was prepared by a paid union representative.

On June 6, 1990, the Company was afforded a hearing on its objections before a hearing officer, who found that although the statement about $60 million in profits was false, it was ''made openly'' in a document that the voters were able to recognize as campaign propaganda. The hearing officer rejected the Company's contention that the document was a forgery because it was signed by the ''employee committee,'' but was actually prepared by an agent of the UAW. ''I do not believe the document rises to that level of deception because the employees would not reasonably be inclined to assume that the material . . . originated exclusively from fellow employees and had no input from the UAW.''

In the hearing, the Company offered no evidence that any member of the organizing committee objected to the May 8, 1990 letter being issued in the committee's name, or that any employee was misled into believing that the prounion statements in the letter were not obviously campaign propaganda, but instead were solely opinions of individual committee members. It offered no evidence that any employee had any reason to believe that the organizing committee members had any special knowledge of company profits, or were a more authoritative source than the Union on that subject.

On December 26, 1990, the Board issued its Decision and Certification of Representative, adopting the hearing officer's recommendation to overrule this and other company objections and his finding that the May 8, 1990 letter was not a forgery within the meaning of *Midland National Life Insurance Co*., 263 NLRB 127 (1982).

In *Midland National* the Board had held, 263 NLRB at 133, footnotes omitted:

> [W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters *unable to recognize propaganda for what it is*. Thus, we will set an election aside not because of the substance of the representation, but because of the *deceptive manner* in which it was made, a manner which renders employees *unable to evaluate the forgery for what it is*. [Emphasis added.]

In its opinion, remanding this case to the Board, 987 F.2d at 365, the court cited its earlier opinion in *Van Dorn Plastic Machinery Co. v. NLRB*, above, 736 F.2d at 348. In *Van Dorn* the court had indicated its ''reluctance to be bound'' by the *Midland National* rule in every case, holding:

> There may be cases where no forgery can be proved, but where the *misrepresentation is so pervasive and the deception so artful* that employees will be *unable to separate truth from untruth* and where *their right to a free and fair choice will be affected*. We agree with the Board that it should not set aside an election on the basis of the substance of representation alone, but only on the deceptive manner in which representations are made. [Emphasis added.]

Then in its opinion, remanding this case, the court ruled, 987 F.2d at 365:

> We continue to adhere to *Van Dorn* as representing a narrow but appropriate limitation on the expansive rule announced in *Midland National Life*—namely, that where the *pervasiveness of misrepresentation or the artfulness of deception* during an election campaign renders employees so *unable to separate truth from untruth that their free and fair choice is affected*, an election must be set aside even in the absence of proof that forgery has occurred. [Emphasis added.]

Thus, under the Board's standards in *Midland National*, the misrepresentation must be made in such a ''deceptive manner'' to render employees ''unable to recognize propaganda for what it is'' and ''unable to evaluate forgery for what it is.''

Under the court's standards in *Van Dorn*, the misrepresentation (whether or not a forgery) must be ''so pervasive'' and the ''deception so artful'' that employees are rendered ''unable to separate truth from untruth,'' affecting their right to a ''free and fair choice.''

The court remanded this case ''to enable the Board to reevaluate, in light of our reaffirmation here of *Van Dorn*, whether the May 8, 1990 letter, even if not a proven forgery,

nonetheless contains misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election.''

2. Contentions of the parties

The Company, in contending that the May 8, 1990 letter was not campaign propaganda, represents that it was signed ''Fellow Employees.'' By doing so, it ignores the fact that the letter was signed by the Union's organizing committee: ''Your Fellow Workers *The Westland Employees Organizing Committee*'' (emphasis added).

The Company contends in its brief (Br. 7) that ''the entire document was a fraud—a forgery'' and further contends (Br. 28–30):

> The May 8 letter was both ''pervasive'' and ''artful.'' The pervasiveness of the letter is obvious as it was mailed to all potential voting employees. Furthermore, the letter, which grossly misrepresented Westland's profits, was admittedly drafted by the UAW. However, this letter was not signed by the UAW or its agent, but fraudulently *signed*, ''*Fellow Employees*.'' This ''artful'' deception impaired the Hudson employees' ability to separate fact from fiction, thus affecting their right to free choice.
>
> Because the letter was *signed by* the Hudson's employees' ''*Fellow Employees*,'' the letter was not recognizable as propaganda conjured up by the UAW to persuade the Hudson's employees to vote in favor of the UAW. . . . Clearly, the signatures on the letter did not indicate that it was partisan nor was it propaganda recognizable as such.
>
> The misrepresentation was presented as true fact, and the format in no way indicated that it was an expression of opinion or campaign propaganda. Such a gross misrepresentation was so material that it undermined the employees' right to free choice, and requires that the election be set aside. [Emphasis added.]

The General Counsel contends in its brief (Br. 6) that ''the disputed letter appears to be typical election campaign propaganda.'' It was ''signed by the Union's organizing committee,'' it ''encouraged employees to vote Yes in the election,'' and ''the employees would reasonably have recognized the letter as campaign propaganda.'' The General Counsel adds (at 6–7):

> The letter contained no altered financial reports or misquoted newspaper stories nor any other device to lend credence to its assertion in respect to the [Company's] profits. The fact that the letter was signed by the Union's organizing committee and urged employees to vote Yes, not only establishes that the document was not a *Midland National Life* forgery, but also demonstrates that there was no artfulness to the misrepresentation. A truly artful misrepresentation in the sense of *Van Dorn* would not have made it patently obvious to the reader that the document originated with a group that wanted the Union to win the election.

The Union contends in its brief (Br. 26–27) that the ''Organizing Committee'' of coworkers that signed the letter ''did not attribute this information to any authoritative source with any special knowledge of these facts and did not claim any special expertise about financial issues.'' It further contends (Br. 28, 31, 33):

> The May 8, 1990 letter is typical campaign propaganda and was unambiguously identified as partisan union literature. It was signed by the ''organizing committee'' which was made up of Westland employees known to be prounion. . . . The misrepresentation in the May 8 letter of the [Company's] profit figures was inadvertent and was proffered by employees with no special knowledge of such profit figures. The letter contained no other inaccurate information. That it was crafted by UAW organizers and signed by the ''Organizing Committee'' does not render it a forgery or a ''deception pervasive and artful enough to interfere with the employees' fair and free choice to such an extent as to require a new election.''
>
> . . . .
>
> Nor was there trickery or deception involved in the identity of the letter's source. The May 8 letter falls precisely within the category of campaign propaganda as it is fully capable of being recognized as such.
>
> . . . .
>
> Here, although the text was drafted by a UAW organizer, the prounion sentiments expressed in the letter are known to be those of the employees of the Organizing Committee. Such surrogate authorship is akin to a management attorney drafting a letter for the Company president to send to all employees urging a ''No'' vote. The letter is not a deception because the attorney, a hired, outside consultant with no employment relationship, drafts the letter for the Company representative to sign.

The Union concluded (Br. 34) that because ''its message was entirely consistent with the sentiments of the 'Organizing Committee,' its distribution immediately preceded the election, and it urged employees to 'VOTE YES,' the letter is easily recognizable as propaganda.''

3. Concluding findings

a. *Under the Board's standards*

It appears clear that under the Board's standards (that the misrepresentation must be made in such a ''deceptive manner'' to render employees ''unable to recognize propaganda for what it is'' and ''unable to evaluate forgery for what it is''), the misrepresentation in the May 8, 1990 letter of a $60 million profit was not made in such a deceptive manner.

When the Board decided in *Midland National* that ''we will not set elections aside on the basis of misleading campaign statements,'' but will ''intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is,'' 263 NLRB at 133, the Board stated some major considerations.

One was to ensure ''the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results.'' A second was that ''As long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party, the Board would leave the task

of evaluating its contents solely to the employees.'' 263 NLRB at 131. A third is that the Board has ''long viewed employees as aware that parties to a campaign are seeking to achieve certain results and to promote their own goals. Employees, knowing these interests, could not help but greet the various claims made during a campaign with natural skepticism.'' 263 NLRB at 132.

In the present case, shortly before the May 11, 1990 election, each bargaining unit employee received a letter through the mail in an envelope with the UAW Region 1A return address. The letter, dated March 8, 1990, contains arguments against the Company and urges a yes vote for the Union. It bears the printed signature of the Union's organizing committee at the Westland mall store, ''Your Fellow Workers.''

The letter, as found, contains a gross misrepresentation. It states that the Company ''claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year'' (emphasis in original), whereas the total sales in 1989 were $52.5 million and the profits were only $1.4 million.

In agreement with the General Counsel and the Union, I find that an employee reasonably could be expected to recognize the letter as union campaign propaganda. It was received from the UAW Region 1A, it bore the printed signature of the Union's organizing committee, it was critical of the Company and its antiunion ''scare tactics,'' it was received shortly before the election, and it concluded: ''VOTE YES FOR THE UAW.''

As the Board specifically held in *Midland National*, as quoted above, ''[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements.''

The only basis for setting aside the election on the basis of the May 8, 1990 letter would be to probe the authorship of the letter, which culminated the organizing committee's 4-month campaign in the store for the Union (since January 1990).

Such a probe would undercut one of the Board's major considerations in adopting the *Midland National* rule, to ensure ''the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results,'' as quoted above.

In the printed signature on the letter, the Union's organizing committee was described as ''The Westland Employees Organizing Committee.'' If such a probe of authorship were made, should the Board require the drafting or approval of the letter by all members of the committee, or by only one or two of the committee leaders? Or, if Director King, Assistant Director Westfall, or another paid member of the staff who assisted in the union campaign prepared the letter, should the Board require *expressed* and not merely *tacit* approval, and if so, by some or all of the committee members? I note that it is only the Company, not any member of the committee, that has challenged the campaign letter as deceptive.

The Board would probably consider such a probe of the authorship of campaign literature—distributed with at least the tacit approval of the person or group whose signature appears on it—would be setting a bad precedent. For example, it would seem most unwise, in the absence of any indication of deception, to probe the authorship of a campaign letter issued in the name of a busy company president or store manager, to determine whether he granted his approval of the wording if the letter were prepared by a personnel manager, attorney, or outside consultant.

b. *Under the court's standards*

I find that similarly under the court's standards in *Van Dorn* (that the misrepresentation —whether or not a forgery—was ''so pervasive'' and the ''deception so artful'' that employees are rendered ''unable to separate truth from untruth,'' affecting their right to a ''free and fair choice''), the misrepresentation of company profits in the May 8, 1990 letter was not made in such a deceptive manner.

Although the misrepresentation was gross, the court in *Van Dorn*, as quoted above, specifically held that ''We agree with the Board that it should not set aside an election on the basis of the substance of representation alone, but only on the deceptive manner in which representations are made.''

In the present case, in the absence of any indication that the Union's organizing committee did not give at least its tacit approval for the May 8, 1990 letter being issued in its name, I find that the authorship of the letter by a paid union representative who was assisting in the campaign at the Westland mall store did not constitute misrepresentation ''so pervasive'' and the ''deception so artful'' that employees were rendered ''unable to separate truth from untruth.''

Although given the opportunity in the hearing before the hearing officer, the Company offered no evidence that the prounion message in the May 8, 1990 letter was not consistent with the sentiments of the Union's organizing committee (which had been campaigning in the store for the Union for 4 months), that the employees were misled into believing that the prounion statements in the letter were not obviously campaign propaganda, or that the employees would have any reason to believe that the organizing committee members would have any special knowledge of company profits.

The Company offered no evidence that the Union's preparation of the letter for the organizing committee in any way rendered the employees unable to separate truth from untruth. Even if employees believed that the Union would not be assisting the organizing committee by preparing campaign literature for it and believed that the committee members themselves composed and reproduced the long letter unassisted—although the letter was mailed to the employees in envelopes bearing the return address of the Union's regional office—there was nothing in the letter that would cause the employees to believe that the committee members would be more knowledgeable about the Company's profits than the Union.

Moreover, among all the campaign propaganda, this was one false statement in one long letter. It was neither a ''pervasive'' nor an ''artful'' deception.

I therefore find, on reevaluating the May 8, 1990 letter in light of the court's reaffirmation of *Van Dorn*, that the letter did not contain ''misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election.''

CONCLUSIONS OF LAW

1. Because employee organizer John Madgwick's belated claim that he forged authorization cards is a ''total fabrication,'' as found, there is no basis for setting aside the May 11, 1990 election on the Company's allegation that the

Union forged authorization cards to create a false picture of the extent of union support.

2. A reevaluation, in light of the court's reaffirmation of *Van Dorn*, reveals that the misrepresentation of company profits in the May 8, 1990 letter was not ''so pervasive'' nor ''deception so artful'' that the employees were rendered ''unable to separate truth from untruth,'' and did not interfere with the employees' fair and free choice to such an extent as to require a new election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The National Labor Relations Board reaffirms its May 15, 1991 bargaining order.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.